DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, California 95814

January 30, 2008

ALL COUNTY LETTER NO. 08-02

REASON FOR THIS TRANSMITTAL

[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[X] Initiated by CDSS

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
CHIEF PROBATION OFFICERS
CDSS ADOPTION DISTRICT OFFICES
COUNTY AND PRIVATE LICENSED ADOPTION AGENCIES
ADOPTION SERVICE PROVIDERS
TITLE IV-E AGREEMENT TRIBES

SUBJECT: SENATE BILL (SB) 678, Chapter 838, Statutes Of 2006
INDIAN CHILD WELFARE CHANGES IN STATE LAW

REFERENCE: The Federal Indian Child Welfare Act of 1978 Codified At 25 U.S.C. Section 1901 et seq.; All County Information Notice I-3-04 (The Indian Child Welfare Act/Frequently Asked Questions); California Rules of Court, Rules 5.480-5.487, 5.664, and 7.1015; Welfare & Institutions Code 300 et seq.; and 602 et seq.; WIC 601, Family Code 3041, and Probate Code 1459.5.

The purpose of this All County Letter (ACL) is to provide information and resources on SB 678 (Chapter 838, Statutes of 2006). This legislation is a comprehensive bill that focuses on child custody proceedings for Indian children. The goal of SB 678 is the uniform application of the federal Indian Child Welfare Act (ICWA) in California. The underlying purpose of the ICWA is to protect the best interests of Indian children, including having tribal membership and connection to their tribal community, and to promote the stability and security of Indian tribes and their families.

For the most part, this legislation does not create new requirements but rather incorporates the federal ICWA into California law. SB 678 places those requirements in the Family, Probate and Welfare and Institutions (W & I) Code provisions governing juvenile court proceedings, as well as some child custody matters in family law, probate guardianships, certain probate conservatorships, and the relinquishment of a child by a parent.

This ACL and the relevant California Rules of Court found at http://www.courtinfo.ca.gov/courtadmin/aoc/ are intended to help with the ICWA compliance and implement SB 678. Additionally, the California Department of Social Services (CDSS) and the Administrative Office of the Courts (AOC), Center for Children and Families, through an Interagency Agreement with CDSS have invaluable information. These resources can be accessed on line. (See http://childsworld.ca.gov and http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-IndianChild.htm.).

This ACL references the ICWA as addressed in SB 678. However, readers are encouraged to read the federal ICWA (25 U.S.C. § 1901 et seq.), the federal regulations (25 C.F.R. § 23.1 et seq.) and the federal guidelines on the ICWA (Federal Register/vol.44, No228/November 26, 1979/Notices 87584).

BACKGROUND

In 1978 the U.S. Congress enacted the ICWA, (25 U.S.C. § 1901 et seq.) partially in response to the demonstrated high rate of Indian children being removed from their tribes, to the detriment of the children who lost ties to their tribes, and of the tribes whose composition and actual survival was threatened by how states handled the removal, placement and adoption of Indian children. The ICWA was intended as a federal mandate to those involved in the child custody system to work collaboratively with tribes to prevent the break up of Indian families and tribes, and to redress past wrongs of the American child custody system. At that time, in California, Indian children were eight times more likely to be removed from their families than non-Indian children and more than 90 percent were placed in non-Indian homes. The ICWA established minimum federal standards that must be followed when removal of Indian children from their families becomes necessary. Since then, states throughout the country, including California, have enacted statutes and regulations in response to the requirements of the ICWA.

The ICWA applies to federally recognized tribes. In California, there are 104 federally recognized tribes, and at least 33 non-federally recognized tribes. California's Indian population now exceeds that of any other state, including Alaska. Recent data indicates that a large number of Indian children in the California child welfare system are still being placed in non-Indian homes. Data further indicates that over 50 percent of Indian children in California are placed with non-relative, non-Indian substitute caregivers. This reflects placement determinations made notwithstanding expressed congressional preferences in the ICWA on placement of Indian children in Indian homes. Further, these issues and others have been verbally expressed by tribal members as part of California's recently completed Children and Family Services Review Statewide Self-Assessment.

Compliance with the ICWA is of significant importance in California. Congress included a provision in the ICWA that allows states to establish higher standards of protection if they choose and that these higher standards must be applied. (25 U.S.C. § 1921.) SB 678 extends the ICWA requirements in several areas. SB 678 uses the definition of "tribe" contained in the ICWA as to which tribes it applies, namely federally recognized tribes. SB 678 has also made it clear that at the court's discretion a non-federally recognized tribe may participate in dependency child custody proceedings and in certain proceedings under the Family Code. As set forth in SB 678, this new provision is not to be construed to make the provisions of the ICWA, or of any state law implementing the ICWA, applicable to the proceedings beyond those specified in the new provision. What is allowed is addressed in part II of this ACL.

I. CLARIFICATIONS TO THE ICWA REQUIREMENTS

Many, if not most, of the provisions that have been codified into state law by SB 678 were pre-existing law emanating from the federal ICWA statute and accompanying federal regulations, which were to some extent already contained in the W & I Code, and in former California Rules of Court Rule 1439 (replaced with comprehensive new Rules 5.480-5.487, 5.664, and 7.1015.) By placing the ICWA provisions more comprehensively into California codes, it is expected that compliance will be facilitated. In addition, the Judicial Council issued new rules effective January 1, 2008, further implementing SB 678.

A. Application of the Act

SB 678 clarifies that the ICWA applies to the following child custody proceedings:

1. Proceedings under W & I Code section 300 et seq., and under W & I Code sections 601 and 602 et seq. in which the child is at risk of entering foster care or is in foster care, including detention hearings, jurisdiction hearings, disposition hearings, review hearings, hearings under W & I Code section 366.26, and subsequent hearings affecting the status of the Indian child;
2. Proceedings under Family Code section 3041 pertaining to the award of custody to a non-biological parent;
3. Proceedings under the Family Code resulting in adoption or termination of parental rights; and
4. Proceedings listed in Probate Code section 1459.5 pertaining to guardianships or conservatorships.

B. Initial Requirement: Inquiry/Notice

There are duties associated with the stage of a child custody proceeding where it has not yet been confirmed by a tribe that a child, as set forth in the ICWA, is a member or eligible for membership in a tribe and a biological child of a member of a tribe.

Duty to Inquire

The duty to issue notice to tribes required by the ICWA implies a duty to inquire whether a child is an Indian child at the first contact. SB 678 makes explicit that in the above specified child custody proceedings, there is an affirmative and ongoing duty to inquire whether a child involved in W & I Code sections 300, 601 or 602 proceedings is or may be an Indian child and in juvenile wardship, if the child is at risk of entering foster care, is in foster care, or whose parent is considering placement for adoption. If the court, social worker, probation officer, adoption agency, adoption service provider, or the court investigator or petitioner in a proceeding under the Family Code or Probate Codes listed above, knows or has reason to know that an Indian child is or may be involved, then further inquiry regarding the possible Indian status of the child must be made. (W & I Code, § 224.3; Prob. Code, § 1459.5(b); Fam. Code, § 177(a).)

The child, the child's parents or legal guardians, the child's Indian custodians if the child is living with an Indian caregiver, should be asked as soon as possible, whether the child is an Indian child. If one learns of relatives having information about the child's Indian ancestry then they should also be asked.

Circumstances that may give rise to a further duty to inquire are specified and include, but are not limited to the following: (1) information is provided by the child, an officer of the court, a tribe, Indian organization, a public or private agency, or an extended family member suggesting the child is a member or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe; (2) the residence or domicile of the child, or the child's parents, or Indian custodian is in a predominantly Indian community; or (3) the child or the child's family has received services or benefits available to Indians from a tribe or from the federal government, such as Indian Health Service. (W & I Code § 224.3(b); Prob. Code §§ 1459.5(b), 1513(h); Fam. Code § 177(a).)

If new information is obtained regarding the child's Indian heritage, notice with the new information must be sent to tribes of which the child may be a member or eligible for membership. (W & I Code § 224.3(f).)

Note: The agency, social worker, probation officer, or petitioner in a probate or family case may get information that suggests the child is affiliated with more than one tribe. This will necessitate further inquiry into information about said tribes and will necessitate notice to all tribes with which the child is potentially affiliated.

Notice Requirements

SB 678 sets forth explicit provisions on how noticing must occur when Indian children may be involved. The state codes now incorporate the provisions that were already in the federal ICWA regulations and guidelines. Special note should be made of these provisions. A significant portion of appellate cases have involved challenges to how the ICWA noticing was carried out. Improper or insufficient notice may invalidate child custody proceedings where the ICWA is applicable. An Indian child, the child's tribe, a parent, or Indian custodian from whose custody the child has been removed, may petition to have a child custody proceeding for foster care, guardianship, or termination of parental rights, invalidated for failure to comply with certain specified ICWA requirements including notice provisions. (W & I Code § 224(e).)

To Whom Notices Should Be Sent

Notice shall be sent to the Indian child's parents or legal guardian, Indian custodian[1] and the tribe or tribes with whom the child is potentially affiliated. (25 U.S.C. § 1912(a); 25 C.F.R. § 23.11(a); W & I Code §§ 224.2(a), 727.4(a)(2); Prob. Code § 1460.2; Fam. Code § 180.)

SB 678 specifies notice is to be sent to the tribal chairperson unless the tribe has designated another agent for service. (W & I Code §224.2(a)(2).) The federal regulations on the ICWA provide that a tribe may designate an agent, other than the tribal chairperson, for service of the ICWA notices. The Bureau of Indian Affairs (BIA) develops a list that is published in the Federal Register as the official document that lists the designated Tribal agents for service of notices and the addresses for the tribes. The most recent list, dated August 2, 2006, is located at: (http://www.doi.gov/bia/ICWA%20Tribal%20Agents%2008-02.pdf). Currently, the BIA is preparing a new list that is anticipated to be completed by early 2008. It will be posted at www.doi.gov/bia.

Note: CDSS attempts to keep a current roster of federally recognized tribes and their addresses on the Child Welfare Services/Case Management System

1 An Indian custodian means "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child". (25 U.S.C. § 1903(6).)

(CWS/CMS) to facilitate noticing of tribes. However, CWS/CMS cannot be used as the sole contact list for purposes of sending the ICWA notices. Some courts have taken a strict view that only the agent for service designated and posted in the Federal Register is the appropriate contact. CDSS is therefore assessing potential modifications to the CWS/CMS list so that the BIA most recent list of designated agents for service is included, in addition to the most recent contact information gathered by CDSS. It is recommended that notice be sent to the individuals in the list of designated agents for service developed by the BIA, as well as the contact person and address from CDSS, to ensure that legally sufficient notice is achieved.

If a tribal affiliation name has any numbering or serial lettering at the end of the name, this indicates that a multiple listing for the same tribal affiliation exists within CWS/CMS. The CWS/CMS user **must also** check the websites noted above, for any and all noticing addresses associated with the Tribe(s). This precaution is necessary since there may be numerous name variations for tribal affiliations.

Method of Notice

1. Notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended but not required.
2. Notice to the tribe shall be to the tribal Chairperson unless the tribe has designated another agent for service in the BIA list of designated agents.
3. Because tribal leadership frequently changes, unless the name of the current tribal chair person is known, we recommend the notice be addressed to "Tribal Chair Person, _____ Tribe."
4. Notice shall be sent to all tribes with which the child is potentially affiliated.
5. When a child's parents, Indian custodian or tribe cannot be determined or located, notice shall be made to the Secretary of the Interiors designated agent, the BIA, Sacramento Area Director.
6. If the identity or location of the parents, Indian custodian and the child's tribe is known, a copy of the notice shall also be sent directly to the Secretary of the Interior unless this requirement is waived in writing by the Secretary and the waiver has been filed with the court.

(25 C.F.R. § 23.11(a) & (b); W & I Code § 224.2.)

Note: The Secretary of the Interior is currently in the process of seeking revision of federal regulations pertaining to the ICWA noticing. If there is a change in federal regulations, CDSS will provide further information in a subsequent All County Information Notice.

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It should be noted that because the ICWA calls for registered mail, (25 U.S.C. § 1912(a)) and the BIA ICWA noticing regulations allow for certified mail (25 C.F.R. § 23.11(a)), SB 678 clarified that under California law either registered or certified mail is acceptable as long as return receipt is requested.

SB 678 specified information required, most of which was already included on the prior noticing form (JV-135). The only two items that were not on JV-135 that are required by SB 678 were: (1) a copy of the child's birth certificate, if available, and (2) the location, mailing address and telephone number of all parties that are noticed. (W & I Code § 224.2(a)(5).) Effective January 1, 2008, new Judicial Council form ICWA 030 contains all of the requirements.

Note: Once a tribe has acknowledged a child or intervened, subsequent notices do not need to include the ancestral information, a copy of the petition in the proceeding, a copy of the child's birth certificate, or the statement of rights.

When Notice Is to Be Sent

Notice is to be sent as soon as it is known or there is reason to know the child is an Indian child. Notice must be sent to all federally recognized tribes of which the child may be a member or eligible for membership, and shall continue to be sent for all hearings until the court makes a determination as to which tribe is the child's tribe or determines that the ICWA does not apply. (W & I Code §§ 224.2 (a)(3), 224.3(e)(3).)

Once a tribe has confirmed the child is a member or eligible for membership and a biological child of a member, then notices shall be sent to the tribe determined to be the Indian child's tribe and notices are to be sent for every hearing thereafter to that tribe. (W & I Code § 224.2(a)(3).)

If proper notice has been provided and neither a tribe nor the BIA has provided a determinative response within 60 days after receiving the notice, the court may determine that the ICWA does not apply to the proceeding, except that it shall reverse itself if subsequently a tribe or the BIA confirms the child is an Indian

child. At that point the court shall apply the act prospectively. Once a court determines that the ICWA does not apply, then notices shall no longer be required unless new information is received based on the petition or other information. Unless and until this determination is made, notices of each hearing should continue. (W & I Code §§ 224.3(e)(3), 224.3(f).)

Evidence of Notice

Proof of the notices sent, including copies of notices sent and all return receipts and responses received, shall be filed with the court prior to the hearing. (W & I Code § 224.2(c).)

Hearing Timing

No hearing, except for the detention hearing, shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the BIA. Upon request, the parent, Indian custodian, or the tribe shall be granted an additional 20 days to prepare for the proceeding. (W & I Code §§ 224.2, 727.4(a)(2); Prob. Code § 1460.2; Fam. Code § 180.)

Note: New Judicial Council Rule 5.482.(a) sets out exceptions for proceeding without delay, subject to specified conditions, for the detention hearing in dependency cases and in delinquency cases in which the probation officer has assessed that the child is in foster care or it is probable the child will be entering foster care. It is recommended that social workers and probation officers familiarize themselves with this rule.

Sanctions for Falsifying or Concealing That the Child Is Indian

Any person whose duty it is to give notice to Indian tribes shall be subject to court sanctions if that person knowingly and willfully falsifies or conceals a material fact concerning whether the child is an Indian child, or counsels a party to do so. (W & I Code § 224.2(e).)

C. Duties After Tribe Has Confirmed a Child Is a Tribal Member

There are specified rights and standards that get triggered once a federally recognized tribe has confirmed that the child is a member or eligible for membership and a biological child of a member per the ICWA. The ICWA sets forth applicable standards such as foster care or adoptive placement preferences, use of a qualified expert witness, active efforts to prevent breakup

of the Indian family, and evidentiary standards. These standards apply regardless of whether a tribe formally intervenes in a proceeding.

Right of Intervention

The Indian child's tribe and Indian custodian have the right to intervene at any point in the child custody proceedings noted in section I. A. above. Once a tribe has formally intervened it is a "party" to the proceeding. Status as a party gives the tribe more participatory rights in the proceeding. Depending on the type of proceeding, (family, probate, dependency, delinquency) the tribe or Indian custodian could call and examine witnesses, cross-examine opposing witnesses, provide evidence pertaining to prevailing social and cultural standards in the tribe, introduce documentary exhibits and other evidence. Under the ICWA they have the right to the records of the proceeding as well. (25 U.S.C. §§ 1911, 1912, 1915; W & I Code § 224.4; Prob. Code § 1459(b); Fam. Code §§ 175(e), 177(a).)

Role of Non-Intervening Tribe

The Indian child's tribe and/or Indian custodian are <u>not required to formally intervene</u> in order to participate in an Indian child custody proceeding.

Whether identified as a formal party or not, the tribe can express placement or adoptive preferences, assist in identification of a qualified expert witness, facilitate identification of placement options, assist by identifying/tribally approving a home, and even identifying available Indian services and programs. These roles are premised on the otherwise existing standards and requirements of the ICWA. (25 U.S.C. § 1912(a), W & I Code §§ 224, 224.4; Prob. Code § 1459(a); Fam. Code §§ 175(e), 177(a).)

When More Than One Tribe Is Involved

If more than one tribe makes the determination that an Indian child is a member or eligible for membership as defined in the ICWA, the court is to make a determination in writing, with its reasons, as to which tribe is the child's tribe for purposes of the child custody proceeding. The court's determination is to include consideration of which tribe the child has more significant contacts, e.g. the child's length of residence on or near the tribe's reservation, participation in a tribe's activities, fluency in the tribe's language, previous cases with one of the tribes, residence on or near the tribe's reservation by the child's parents, Indian custodian, and the child's self-identification. (25 U.S.C. § 1903(5)(b); W & I Code § 224.2(b); Prob. Code § 1449(d); Fam. Code § 170.)

Appointment of Counsel

The parent, and Indian custodian, if indigent, has the right to counsel. (W & I Code § 317(a)(2), Prob. Code § 1474; Fam. Code § 180(b)(5)(G)(v).)

Tribal CASA Programs

Tribal Court Appointed Special Advocates (CASA) programs may be established independent of state funding. State courts have the discretion to appoint CASA representatives from such tribal programs in Indian child custody proceedings. (W & I Code § 110.)

Access to Court Documents and Records If the Tribe Intervenes

When a tribe formally intervenes in a child custody action, it becomes a party to the proceeding. As a party it is entitled to be treated in the same manner as counsel. The tribe's rights as a party include the right to examine all reports and documents filed with the court. (25 U.S.C. § 1912(c); Prob. Code § 1459.5(b); Fam. Code § 177(a); Rule of Court 5.664(h).)

If the tribe does not intervene but sends a tribal representative to appear in the case, that tribal representative does not have an automatic right to access court documents and records; it is up to the court to decide whether to give the tribal representative access.

Active Efforts

The ICWA requires active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. SB 678 has codified this provision, explicitly placed it in the Family and Probate Codes and provided further guidance on what constitutes active efforts. (25 U.S.C. § 1912(d), W & I Code § 361.7; Prob. Code § 1459.5; Fam. Code §§ 177(a), 3041(e).)

Normally involuntary foster care placements require only that **reasonable efforts** be made to prevent or eliminate the need for removal of the child from his or her home and whether there are available services that would prevent the need for further detention. (W & I Code § 319.) However, when an Indian child is involved, **active efforts** designed to prevent the breakup of the Indian family must also be made. Active efforts are now also explicitly codified in the Family and Probate Codes and required in the child custody proceedings listed above in section I. A.

In dependency and delinquency cases, the court must make both reasonable efforts and active efforts findings on the record.

In these cases, the petitioner *must provide evidence to the court* that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these *efforts were unsuccessful*. What constitutes active efforts is assessed on *a case by case basis*. However, active efforts are to be conducted in a manner that takes into account the "*prevailing social and cultural values and way of life of the Indian child's tribe*." Active efforts must use the available resources of extended family, the tribe, tribal and other Indian social service agencies and individual Indian caregiver service providers. (W & I Code § 361.7; Prob. Code § 1459.5(b); Fam. Code §§ 177(a), 3041(e).)

Burden of Proof

No removal of an Indian child from the custody of his or her parents or placement out of the home may be ordered in the absence of a determination, supported by **clear and convincing evidence**, including testimony of a qualified expert witness that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (25 U.S.C. § 1912(e); W & I Code § 361.7(c); Prob. Code § 1459.5(b): Fam. Code § 7892.5(a).)

In a termination of parental rights case the evidentiary burden is higher. Parental rights may not be terminated in the absence of a determination, supported by evidence **"beyond a reasonable doubt"** including testimony of a qualified expert witness that the continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (25 U.S.C. § 1912(f); W & I Code § 366.26(c)(2)(B)(ii); Fam. Code § 7892.5(b).)

Qualified Expert Witness Testimony

The removal of an Indian child may only occur if there is clear and convincing evidence that is supported by the testimony of an expert witness that continued custody by the parent is likely to result in serious emotional or physical damage. The purpose for the use of the qualified expert witness is to provide testimony on the issue of detriment to the child. Qualified expert witness testimony is required before a court orders the child be placed out of the custody of his or her parents or terminates parental rights. (25 U.S.C. § 1912(e); W & I Code § 361.7(c); Prob. Code § 1459.5(b): Fam. Code § 7892.5(b).)

SB 678 has specified that, provided the individual is not an employee of the person or agency recommending foster care placement or termination of parental rights, a qualified expert witness may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, tribal historian, or tribal elder. County social workers will thus be disqualified as an expert witness in the same county where the worker is employed. (W & I Code § 224.6(a); Prob. Code § 1459.5; Fam. Code § 177(a).)

Testimony from an expert witness may be by declaration or affidavit only if all of the parties have agreed in writing. However, we recommend the use of testimony rather than declarations, as testimony may provide more information to a judge on issues that may not have been anticipated when a declaration was written. (W & I Code § 224.6(e); Prob. Code § 1459.5(b); Fam. Code §§ 177(a), 3041(e).)

In addition, we recommend counties consider having the proposed expert witness contact the child, the child's family and tribe prior to court hearings; such contact may provide valuable insight on whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage.

Note: The AOC's Center for Children and Families, has posted a list of individuals who are identified as qualified experts for the ICWA purposes. The AOC and the Department do not endorse or guarantee any of the individuals on the list. The list is noted here as a resource. Any agency or individual seeking to use an individual on the list has the responsibility to independently evaluate that individual for suitability for an ICWA proceeding.
http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-

Consideration of Prevailing Social and Cultural Standards

In a court's determination on whether to remove a child or to terminate parental rights, the court is required to consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices. Counties must therefore consider how information is to be provided to the court about the tribe's prevailing social and cultural standards. The tribe of the child would be able to identify individuals who can speak to the tribe's social and cultural standards. In addition, as suggested above, a qualified expert can facilitate the presentation of this evidence when there is contact between the expert and the child, the child's family and the child's tribe. (W & I Code § 224.6(b)(2); Prob. Code § 1459.5(b); Fam. Code §§ 177(a), 3041(e).)

Placement Preferences

Under the ICWA, cultural considerations and concern for tribal heritage are relevant to child custody proceedings. The standards to be applied in meeting the preference requirements of the ICWA are the prevailing social and cultural standards of the Indian community in which the child's parent or extended family resides, or with which the parent or extended family maintains social and cultural ties. Thus, the ICWA requires that states defer to Indian social and cultural standards in placement and treatment assessments. (25 U.S.C. § 1915(d).)

The ICWA specifies, and SB 678 reiterates, that placement of Indian children shall be in the least restrictive setting within reasonable proximity to the Indian child's home and meets the child's special needs. Placement must be made in accordance with the ICWA designated preferences, unless there is good cause to deviate from the order. Placement preference must be given in the following order: (1) a member of the child's extended family; (2) a foster home licensed, approved or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; (4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs. Adoptive placement preferences are: (1) with a member of the child's extended family; (2) with other members of the Indian child's tribe; (3) with other Indian families. (25 U.S.C. § 1915; W & I Code § 361.31, Prob. Code § 1459.5(b); Fam. Code § 177(a).)

Placement preference order may be altered in conjunction with requests by the Indian child's biological parents or the child when the child is of sufficient age, or the tribe via tribal resolution. The CWS agency or court making the placement must follow this order, as long as the placement is the least restrictive setting appropriate for the child.

Additionally, pursuant to existing foster care policies every effort should be made to place siblings together.

Tribally Approved Homes As A Placement Option

Pursuant to the ICWA at section 25 U.S.C. § 1915(b), all federally recognized tribes are authorized to approve a tribally approved home for the purpose of foster care placement or pre-adoptive placement of an Indian child. Tribally approved homes are preferred to non-Indian foster homes under the ICWA, and local child welfare departments and probation departments should work with

tribes to find out about Indian families whose homes have been tribally approved and utilize these homes unless good cause to the contrary exists.

Tribally approved homes are equivalent to licensed or county approved homes and are exempt from licensing requirements under the California Health and Safety Code.[2]

However, tribes are not exempt from criminal record clearance requirements for all potential caregivers and all adults living in the tribally approved home. For a child who falls under county court jurisdiction, the county still has the responsibility to conduct the criminal record clearances as this is a Title IV-E requirement.[3] In addition, the Child Abuse Central Index (CACI) clearance requirements must also be conducted as part of the safety considerations of the home.

When an Indian child under the jurisdiction of the county is placed in a tribally approved home, claiming for Title IV-E foster care funding is authorized. The Federal Title IV-E regulations specify that for purposes of Title IV-E funding, a foster family home includes a tribally approved home that is "on or near Indian reservations".[4] This is consistent with the ICWA as section 25 U.S.C. section 1931(b) states that for purposes of qualifying for assistance, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a state.[5] (25 U.S.C. §§ 1915(b), 1931(b); 45 C.F.R. § 1355.20; Health and Safety Code § 1505(o).)

Further clarification about use of tribally approved homes will be provided in a subsequent All County Information Notice.

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[2] H&S Code § 1501(o) exempts from licensing requirements, "Any facility in which only Indian children who are eligible under the federal Indian Child Welfare Act, Chapter 21 (commencing with Section 1901) of Title 25 of the United States Code are placed and that is one of the following: (1) An extended family member of the Indian child, as defined in Section 1903 of Title 25 of the United States Code. (2) A foster home that is licensed, approved, or specified by the Indian child's tribe pursuant to Section 1915 of Title 25 of the United States Code."

[3] 25 U.S.C. § 1931 "For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive home or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a state."

[4] 42 U.S.C. § 671 (a)(20);45 C.F.R. § 1356.30

[5] 45 C.F.R. § 1355.20 "Foster family home means, for the purpose of Title IV-E eligibility, the home of an individual or family licensed or approved as meeting the standards established by the State licensing or approval authority(ies) (or with respect to foster family homes on or near Indian reservations, by the tribal licensing or approval authority(ies)), that provides 24-hour out-of-home care for children."

Note: Pursuant to W & I Code section 361.4(f), a tribe has the option to request that CDSS conduct a criminal record clearance exemption request for the purpose of consideration of an individual as a foster care parent in a case under county jurisdiction. This section provides an additional avenue for tribes to facilitate approval of a potential foster parent for placement of an Indian child under county court jurisdiction. For purpose of processing a tribal exemption request CDSS will request copies of county documentation regarding the individual to whom the exemption request pertains.

D. Termination of Parental Rights and Relinquishments, and Adoptive Placement Agreement

Circumstances When Parental Rights May Not Be Terminated

SB 678 expanded the exceptions to termination of parental rights specific to Indian children. W & I Code Section 366.26 identifies when termination of parental rights would not be in the child's best interest. SB 678 adds two new exceptions to section 366.26(c) pertaining to Indian children.

Section 366.26(c)(1)(F) provides that the compelling reasons for determining that termination of parental rights would not be in the best interest of an Indian child, include, but are not limited to:

"(i) termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights; and,

(ii) the child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child."

SB 678 adds to the exception provision for Indian custodians who while unable or unwilling to adopt the child, are nevertheless capable of providing a stable and permanent environment, and where removal would be detrimental to the child. (25 U.S.C. § 1913, W & I Code §§ 361.7, 366.26(c)(1)(D) and (F).)

These new provisions may alter permanency plans for Indian children. In the case of an Indian child in a relative placement or a Non Related Extended Family Member placement, the county and court should consider if there may be compelling reasons not to terminate parental rights of an Indian parent.

Voluntary Termination of Parental Rights

The parent of an Indian child may voluntarily consent to termination of parental rights as long as the following requirements are met:

1. Consent is given at least 10 days after birth of child; and
2. Consent is given in writing; and
3. Consent is recorded before a court of competent jurisdiction; and
4. The judge certifies that the terms and consequences of consent were fully explained in detail; and
5. The judge certifies that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language the parent or Indian custodian understood.

Adoption agencies, adoption service providers, and adoption attorneys must be aware that there is a duty to inquire about Indian status when an Indian child is involved in a consent to or relinquishment for adoption, adoption placement agreement, or in a voluntary out-of-home placement/provision of voluntary family reunification services. (Fam. Code §§ 8606.5, 8620, 8801.3.)

Withdrawal of Consent

The parent may withdraw consent at any time before the final decree of adoption has been entered in court. The Indian child must be returned to the parent or Indian custodian when consent has been withdrawn.

After the final decree is entered in a state court, consent may only be withdrawn if there is evidence that consent was obtained through fraud or duress. (25 U.S.C. § 1913(b); W & I Code § 16507.4; Prob. Code § 1500.1; Fam. Code §§ 8620(b), 8606.5.)

E. Clarifications/Modifications In Adoption Proceedings

CWS/adoption staff should consider cultural practices of the tribe for achieving permanency for an Indian child. Adoption is still contrary to customary practices for many tribes. However, like the state and counties, tribes are committed to finding suitable permanency options for their Indian children. CWS/adoption staff is encouraged to discuss the traditional preferred permanency options for their children. The CDSS ICWA Workgroup (which includes county representatives), will be exploring such options and will, in the near future, release guidance regarding permanency planning for Indian children and youth.

Abandonment of Indian Children

Under Family Code section 7822, a Petition for Freedom from Parental Custody and Control can be brought for the purpose of an adoption where there are circumstances indicating the parent or parents have abandoned the child. Per Family Code section 7808, section 7822 applies only to non-dependent children. These proceedings are distinct from proceedings in which parental rights to court-dependent children are terminated.

SB 678 amended Family Code section 7822 to add conditions before an Indian child can be considered abandoned when an Indian child has been transferred to the care and custody of an Indian custodian. The intention to abandon the child can be established only if the Indian parent does not resume custody when requested by the Indian custodian, or the Indian parent does not keep the custodian apprised of his/her whereabouts to receive the request for resumption of the child, or the parent fails to substantially comply with agreements made between the Indian parent and the Indian custodian despite the objections to the noncompliance. Family Code section 7822(e) applies only when custody of an Indian child is transferred to an Indian custodian. In other abandonment cases regarding non-dependent Indian children, subdivisions (a) through (d) of Family Code section 7822 would be applicable.

Post-adoption Contact Agreements

The Family Code now expresses a legislative finding that adoptive children may benefit from contact with their birth relatives, and in the case of an Indian child, their tribe. Nothing is to be construed to prevent post-adoption agreements if found by the court to be voluntary and in the best interest of the child. However, <u>after</u> a decree of adoption has been issued, a failure to comply with the terms of a post-adoption contact agreement is not grounds to set aside the decree, rescind a relinquishment or modify a termination of parental rights.

The new provisions on post-adoption agreements now provide courts with recourse relative to stalled or unsuccessful post-adoption contact agreements for Indian children. Prior to the entry of the adoption order, if the prospective adoptive parent fails to negotiate in good faith, after having agreed to enter into negotiations, the birth parent, birth relative or Indian tribe may petition the court to order the parties to engage in family mediation services to reach a post-adoption contact agreement. If after mediation, the parties fail to negotiate in good faith to enter into an agreement, the court has the following options:

1. Order further mediation; or
2. Initiate guardianship proceedings in lieu of adoption; or
3. Authorize a change of adoptive placement for the Indian child.

The court has significant authority prior to issuance of a decree of adoption, to require mediation of the parties for the purpose of reaching a post-adoption contact agreement when the child is an Indian child and when the adoptive parent had agreed to enter into negotiations for the purposes of post adoption contact. If the court finds that there is a lack of good faith mediation, the court may, modify prior orders, or issue new orders to ensure the best interest of the Indian child, including ordering further mediation initiating guardianship in lieu of adoption, or authorizing a change of the adoptive placement. Failure to reach an agreement does not in and of itself constitute evidence of lack of good faith. (Fam. Code §§ 8616.5, 8620(f).)

Terms of Post-Adoption Agreements

Terms of a post-adoption agreement shall be limited to, but need not include all, of the following:

1. Visitation between child and birth parent, birth relatives, and the child's tribe;
2. Future contact between birth parents, birth relatives, and the child, and/or child's adoptive parent, and the tribe;
3. Future sharing of information about the child.
   (Fam. Code §§ 8616.5 and 8620(f).)

Modification or Termination of Post-Adoption Agreement

The court issuing the decree of adoption retains jurisdiction to issue a modification or termination of a post-adoption agreement under two circumstances. The first is where all parties, including the child, (if 12 years of age or older) have signed the modified agreement, and it is filed with the court. The second is where the court finds all of the following: the modification/termination is necessary to serve the best interest of the child, there has been a substantial change of circumstances since the original agreement, and the party seeking the modification/termination has participated in good faith mediation or other dispute resolution prior to coming to the court.

An evidentiary hearing is not required. Documentary evidence may serve as the basis for the decision to terminate or modify the post-adoption agreement. The court is not to order further investigation or evaluation by a public or private

agency, unless there is a finding by clear and convincing evidence that the best interest of the child may be protected or advanced only by the inquiry and that the inquiry will not disturb the stability of the child's home to the detriment of the child. (Fam. Code § 8616.5 (h).)

Failed Adoptions

Whenever there is a failed adoption of an Indian child by either set aside or a voluntary termination of parental rights by the adoptive parent, a biological parent and/or prior Indian custodian may petition for return of custody and it will be granted unless return is not in the best interest of the child. (Fam. Code § 8619.5.)

Normally when a court is exercising jurisdiction over adoption matters, it may not exercise such jurisdiction if at the time of filing of the petition, a court of another state has a proceeding concerning the custody or adoption of the minor and/or if a court of another state has issued a decree or order concerning the minor. SB 678 amends Family Code section 9210 to specify that "a court of another state" includes, in the case of an Indian child, a tribal court having and exercising jurisdiction over a custody proceeding involving the Indian child. (Fam. Code § 9210(d).)

F. Documentation of Active Efforts To Comply With Placement Preferences

The ICWA requires that a record of each foster or adoptive placement of an Indian child be kept, and that the record must provide evidence of the efforts to comply with the order of placement preferences. Such record is to be made available to the Indian child's tribe and/or to the Secretary of the Interior. SB 678 has added that the record is to document "active" efforts taken to comply with the order of placement preference and that the record is to be kept in "perpetuity". (25 U.S.C. § 1915(e); W & I Code § 361.31(k).)

The CWS/CMS is maintained indefinitely; therefore, any information requested by a tribe or by the Secretary pursuant to this section, will be retrievable from CWS/CMS. Accordingly, to comply with this requirement, counties must document their active efforts to comply with the placement preferences now specified in W & I Code Section 361.31.

This documentation shall be entered into CWS/CMS in the Narrative Section of the Contact Information Page found in the Client Services Notebook. It must also

be entered in the Comments Section of the Non-Foster Care Page found in the Placement Notebook. The detailed documentation of active efforts in both Notebooks records the active effort for both **placement** and **case management**. This provision does not otherwise modify retention or release of record requirements.

G. Transfer Issues

A tribe, parent, or Indian custodian may petition the court to transfer Indian child custody proceedings to a tribal jurisdiction. SB 678 has codified ICWA requirements for the transfer of these cases including that the court must transfer the case unless there is good cause not to do so. (W & I Code, § 305.5(b); Prob. Code § 1459.5(b); Fam. Code § 177(a); see also Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979)).

In addition, when a social worker takes an Indian child into protective custody, SB 678 specifies short timeframes for notification and transfer of child custody proceedings where the child is a ward of a tribal court of an exclusive jurisdiction tribe or resides or is domiciled on such a tribe's land.[6] Notice of the removal is to be provided to the tribe no later than the next working day. The county must provide all relevant documentation to the tribe regarding the removal and the child's identity. Upon written determination from the tribe confirming the child is an Indian child within its jurisdiction, the county is to transfer the child custody proceeding within 24 hours of receipt of the determination. (W & I Code §3 05.5 (a), Prob. Code § 1459.5 (b), Fam. Code § 177(a).)

Transfer questions will also arise when a social worker takes an Indian child into protective custody and finds out that the Indian child is already a ward of a non-exclusive jurisdiction tribal court.

In all of the above situations is it important that the social worker work closely with county counsel as issues that affect court jurisdiction should be left to the county counsel and the court. These provisions do not negate the obligation of county social workers to continue with their statutory duty to file a petition if the child has not been released from custody within 48 hours.

[6] A tribe in a PL 280 state such as California has exclusive jurisdiction over Indian child custody matters where the tribe has petitioned to reassume exclusive jurisdiction pursuant to ICWA at 25 U.S.C section 1918. In California only the Washoe Tribe has formally reassumed exclusive jurisdiction. Note tribes from non-PL 280 states will be exclusive jurisdiction tribes as well.

Transfers to Out-of-State Tribes and the Interstate Compact on Placement of Children (ICPC)

SB 678 clarified that transfer of jurisdiction pursuant to the ICWA section 1911, of an Indian child custody proceeding to the tribal court of an out-of-state tribe, does not trigger application of the Interstate Compact on Placement of Children (ICPC). (25 U.S.C. § 1911; Fam. Code § 7907.3.)

H. **Application of ICWA In Probate Court**

The Probate Code now includes language regarding the ICWA definitions and the legislative intent of the ICWA. Petitions for guardianship must include if a proposed ward is or may be an Indian, and identify the Indian custodian and or Indian child's tribe. The parent, Indian custodian or Indian guardian, if indigent, shall have the right to appoint counsel. (Prob. Code §§ 1449, 1459, 1474, 1510.)

Probate Code section 1459.5 incorporates the ICWA requirements specified in W & I Code sections 224.3 through 224.6, (inquiry, notice, intervention, full faith and credit, qualified expert testimony) inclusive, section 305.5 (transfer), 361.31 (placement preferences), and 361.7 (active efforts).

Because no state entity is involved in these proceedings, it will be the responsibility of the parties and their attorneys, if they are represented, and the court presiding over the cases to comply with these ICWA requirements. The court clerk has a role in noticing in in pro per guardianship proceedings.

II. PARTICIPATION BY NON-FEDERALLY RECOGNIZED TRIBES

The requirements specified by the ICWA apply to tribes that are recognized by the federal Department of the Interior, BIA. Tribes that are not federally recognized have not been allowed to have a role in child welfare proceedings for their children. In the 1950's the United States went through a period of actively terminating recognition of tribes. In California 30 to 40 tribes were terminated. Today many of these tribes continue to exist although without the benefits and rights associated with federal recognition.

SB 678 has provided that California will now allow a court to permit a non-federally recognized tribe to participate in child welfare proceedings when an Indian child is involved that otherwise meets the definition of an Indian child under the ICWA except that his or her tribe is not federally recognized. The court may permit the tribe from which the child is descended to participate in the proceeding upon request of the tribe. (W & I Code § 306.6; Fam. Code § 185.)

If the court permits a tribe to participate in a proceeding, the tribe may do all of the following:

1. Be present at the hearing.
2. Address the court.
3. Request and receive notice of hearings.
4. Request to examine court documents relating to the proceeding.
5. Present information to the court that is relevant to the proceeding.
6. Submit written reports and recommendations to the court.
7. Perform other duties and responsibilities as requested or approved by the court.

If more than one tribe requests to participate in a proceeding, the court may limit participation to the tribe with which the child has the most significant contacts, as determined in accordance with W&I Code section 224.1(d)(2). (Fam. Code § 170.)

This section is intended to assist the court in making decisions that are in the best interest of the child by allowing a tribe to inform the court and parties about placement options for the child within the child's extended family or the tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's parents may have as Indians.

This provision of SB 678 is consistent with existing and acknowledged laws and best practices in child welfare practice. It is consistent with preferences for placement of children with relatives and within the objective of placing children so that they retain ties to their communities. Tribes are composed of close knit communities of extended families. Even when individuals are not biologically related, they would likely be eligible for consideration as Non-Related Extended Family Members because of the cultural connections and tribal lifestyle. Placement of Indian children with their families and in their tribal communities is consistent with the objectives of strategies recently adopted and implemented in many counties, such as Family to Family, relative placements, wrap around programs, etc. In addition, even though these tribes might not be federally recognized, members and their descendants may nevertheless qualify for programs and services for Indian families, such as Indian health or mental health services. Such programs and potential services are valuable resources in a well crafted case plan for the Indian child.

When a county knows non-federally recognized tribes exist within its county borders, it is good practice to informally contact local tribes and inform them of the opportunity to appear before the court to request permission to participate in child welfare proceedings involving tribal members or potential members. Contact can be further facilitated through ongoing local ICWA round table or workgroup discussions. It is therefore appropriate to inform a tribe when one of their children has been taken into custody. Collaboration with these tribes is strongly encouraged, to facilitate the provision of

additional supports for Indian children, as well as the identification of culturally-appropriate placement opportunities.

These provisions are not to be construed to make the requirements of the ICWA or any state law implementing the ICWA, applicable to the proceedings beyond those specified.

Note: These provisions are not in the Probate Code.

CDSS ICWA Contacts

CDSS has designated staff assigned to provide technical assistance regarding the ICWA. Ana Bolanos-Kellison is the CDSS ICWA Specialist and can be reached at (916) 651-6031. Diana Orcino is the ICWA Analyst assigned to assist with the ICWA matters and can be reached at (916) 657-1730.

Questions regarding this ACL should be addressed to me at (916) 657-2614 or Teresa Contreras, Chief, Office of Child Abuse Prevention, at (916) 651-6960.

Sincerely,

Origional Document Signed By:

GREGORY E. ROSE
Acting Deputy Director
Children and Family Services Division

c: CWDA
CPOC